

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
Review of the Commission's Broadcast and	)	MM Docket No. 98-204
Cable Equal Employment Opportunity	)	
Rules and Policies	)	

To: The Commission

**COMMENTS OF THE CURATORS OF THE UNIVERSITY OF MISSOURI  
ON SECOND NOTICE OF PROPOSED RULE MAKING**

The Curators of the University of Missouri, a public corporation (hereinafter, the "University"), by its attorneys, hereby submits comments in response to *the Second Notice of Proposed Rule Making* (the "*Second NPRM*"), 67 Fed. Reg. 1704 (January 14, 2002) in the above-referenced proceeding.<sup>1</sup>

**I. INTRODUCTION**

The University of Missouri is the state university of Missouri, established by Article IX, Section 9 of the Missouri Constitution and governed by a Board of Curators whose members are appointed by the governor and confirmed by the State Senate. Founded in 1839 to fulfill a mission of teaching, research, and service for the citizens of the state and for the nation, the University is the oldest land grant institution west of the Mississippi River. The University pursues its mission of teaching students and serving the citizens in material part through its role as the licensee of commercial television station KOMU-TV, Channel 8, Columbia, Missouri and

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<sup>1</sup> These comments are timely filed. By Order, DA 02-400, released February 22, 2002, the Commission extended the time for filing comments in this proceeding until April 15, 2002.

noncommercial educational FM broadcast stations KBIA(FM), Columbia, Missouri, KCOU(FM), Columbia, Missouri, KUMR(FM), Rolla, Missouri, KMNR(FM), Rolla, Missouri, KWMU(FM), St. Louis, Missouri and KCUR-FM, Kansas City, Missouri. These stations are an integral part of the University community and have strong records of public service in their communities. Each also serves as a training ground for University students, including those students enrolled in the University's renowned School of Journalism in Columbia. The stations provide an opportunity for many students to garner first-hand experience in the operations of radio and television stations. The University has received national recognition and media attention for the substantial role it plays in training students for careers in broadcasting. Indeed, KOMU-TV, Channel 8, an NBC network affiliate, is one of the only, if not the only, VHF commercial television station licensed to a public educational institution in the United States. Many of the students who have worked at KOMU-TV and/or at the University's radio stations have gone on to jobs at other commercial and non-commercial stations across the country, to top-level positions in the broadcasting industry and to the major networks.

**II. THE FCC SHOULD ADOPT A POLICY OF REQUIRING WIDE  
DISSEMINATION OF JOB VACANCY ANNOUNCEMENT ONLY FOR  
FULL-TIME POSITIONS AND SHOULD NOT BURDEN BROADCASTERS  
WITH UNNECESSARY PAPERWORK**

At its various campuses throughout Missouri, the University is committed to equal employment opportunity and has established Human Resources departments to ensure that, when job vacancies become available, information concerning those vacancies is widely disseminated. Each of the broadcast stations makes use of these resources when hiring. The Human Resources

Departments were originally set up to comply with all state and federal EEO requirements. However, over the years, as the FCC's paperwork requirements became more and more stringent, the departments found that they had to generate additional forms and procedures simply to comply with the unique requirements imposed by the FCC. For instance, the University is subject to employment regulations issued by the Office of Federal Contract Compliance ("OFCCP"), in its role as a federal contractor. The OFCCP regulations differ from the previous FCC EEO regulations and from the rules proposed in the *Second NPRM*. Thus, the University in the past had to develop two sets of guidelines – one for projects governed by OFCCP and one for the University's broadcast facilities operated pursuant to FCC licenses. Under the proposed rules, licensees such as the University will once again find themselves facing different sets of federal EEO regulations which require different record-keeping and different compliance standards. The staff resources and paperwork necessary to comply with these differing requirements create substantial and expensive burdens — burdens that will ultimately divert resources from the University's core public interest mission lest it face FCC penalties should it fail to meet duplicative and inconsistent paperwork responsibilities.

Moreover, the record indicates no need for FCC re-regulation in EEO enforcement. The FCC's previous EEO regulations have been suspended twice since 1998. Despite the passage of time, the FCC has not demonstrated any detriment to the public interest from the absence of a rule. In fact, the vast majority of licensees, and particularly state educational institutions, recognize their responsibility to uphold equal employment opportunity. The United States is becoming more diverse and institutions and businesses – particularly those founded for public purposes – recognize the diversity present among the public to which their service is mandated.

As a result, the climate that caused the FCC to adopt the EEO rules in the late 1960s simply no longer exists.

It is incumbent upon the FCC to recognize that times change and what may have been good regulation at one time may no longer serve a purpose. Before imposing the paperwork burdens that will be generated by the new rule, the FCC should first determine whether it needs anything more than a requirement that broadcasters widely disseminate information about full-time job vacancies. Licensees could comply with this requirement by keeping lists of the Internet sites to which job openings were sent and lists of referral organizations that were notified of job openings.

The Commission should also limit its wide dissemination requirement to full-time job vacancies. Past FCC pronouncements have stated that “[t]he Commission’s primary enforcement policies focus on minorities and women employed on a full-time basis.” *See Implementation of Commission’s Equal Employment Opportunity Rules*, MM Docket No. 94-34, 9 FCC Rcd 2047, 2050 (1994) (“EEO Notice of Inquiry”); *see also, Order and Notice of Proposed Rule Making in the matter of Streamlining Broadcast EEO Rules*, 11 FCC Rcd 5154, 5174 n. 52 (1996). Applying EEO requirements to part-time employees creates difficult problems for licensees such as the University. For instance, to fulfill its purpose as a teaching facility, KOMU-TV usually has 40-to-60 student interns each semester. These interns are University of Missouri students who have enrolled in particular courses relating to television broadcasting. For insurance purposes, all of the students are placed on the KOMU-TV payroll as part-time employees. To include them as part of the recruitment and hiring statistics could well be misleading and KOMU-TV has had to explain the situation in the FCC Forms 395-B that it has filed in previous years.

In sum, the Commission should apply any EEO rule only to full-time positions for the following reasons: first, the Commission has maintained that its primary focus is on full-time employment; second, there is a tremendous turnover of part-time employees and applying strict recruitment rules impedes the ability of broadcasters to quickly fill needed slots; third, given the University's unique situation and reliance on student interns for many part-time positions, it does not make sense to require wide dissemination of job vacancies for such positions.

### **III. THE FCC SHOULD HAVE A POLICY OF DEFERRING TO THE EEOC, THE COURTS AND STATE EEO AGENCIES WHEN THERE ARE COMPLAINTS OF DISCRIMINATION BY BROADCASTERS**

In the *Second NPRM*, the Commission proposes to retain its policy of generally deferring action on individual complaints of employment discrimination against broadcasters pending final action by the Equal Employment Opportunity Commission ("EEOC") and other government agencies and/or courts established to enforce nondiscrimination laws. *Second NPRM* at para. 19. However, the Commission proposes to retain discretion to sanction a broadcaster for such allegations, even in the absence of adjudication by the EEOC, a state equal employment agency or a court.

History has demonstrated that the FCC lacks the expertise to adjudicate allegations of discrimination and that it is far too easy to file petitions to deny alleging discrimination in attempts to extract tribute, in the form of greenmail, from broadcasters. When faced with allegations of discrimination, the FCC tends to delay action on pending applications to the detriment of the broadcaster. Given both this lack of expertise and the due process concerns requiring a policy that dissuades abusive and frivolous claims of discrimination, the FCC should state clearly that it will grant full faith and credit to EEO-related rulings from those with competent jurisdiction over employment discrimination claims. The FCC should not permit

those who have lost discrimination claims before another tribunal to then attempt to use the FCC as a new venue to re-litigate their complaints. Entertaining such complaints is both costly to broadcasters and wasteful of Commission resources.

Moreover, the U.S. Constitution requires the Commission to afford full faith and credit to all such judicial decisions that have not been overturned on appeal<sup>2</sup> and do not involve a federal question over which a state court lacks jurisdiction and is therefore not competent. In the case of EEO regulations, state and federal rules are complimentary as evidenced by the joint and concurrent jurisdiction that is an integral part of the national EEO enforcement scheme.<sup>3</sup> Therefore, few, if any, situations exist that would allow the Commission to ignore a court finding and make its own determination. The Commission should, instead, apply its long-standing character policy; following adjudication involving discrimination, as with any crime, infraction, or civil matter, the Commission has the power to determine if the facts militate for FCC penalties up to and including loss of licensee.<sup>4</sup>

An FCC policy of deferring to competent authorities would comport with the greater public interest by ensuring that tribunals with expertise and adequate resources adjudicate EEO complaints. If the EEOC, an expert state agency or a court makes a final determination that a broadcaster has in fact discriminated, the FCC can then determine whether additional licensee sanctions would be appropriate. Indeed, in analogous situations involving anti-competitive conduct and antitrust violations, the Commission has acknowledged the expertise of other

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<sup>2</sup> U.S. Const., art. IV, sec. 1.

<sup>3</sup> *See, e.g.*, 29 C.F.R. § 1601.13.

<sup>4</sup> *See, e.g., Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (2000) (affirming the revocation of station licenses from a licensee whose principal, *inter alia*, committed acts that “shock the conscience.”)

agencies and deferred to those agencies for the determination as to whether there has been wrongdoing. The FCC also relies on Federal Aviation Administration expertise regarding the effects of tall antenna structures on aviation,<sup>5</sup> the Environmental Protection Agency on broadcasting-related environmental issues,<sup>6</sup> and the State Department in confronting questions about U.S. obligations arising from international telecommunications treaties.<sup>7</sup> The FCC understands its limitations in other technical areas, and should acknowledge similar limitations, here. Therefore, the Commission should not just have a policy of “generally deferring” to the EEOC or other agencies, as it proposes in ¶19 of the *Second NPRM*; it should incorporate such deference into any *rule* it implements, just as it does in the antitrust, aviation safety, environmental and international relations contexts. Indeed, the 1985 *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 51 Fed.Reg. 21798 (1986), correctly contemplated that the EEOC would adjudicate *all* complaints within its jurisdiction involving broadcast licensees.

#### **IV. THE COMMISSION MUST AVOID UNCONSTITUTIONAL REQUIREMENTS**

The United States Court of Appeals for the District of Columbia Circuit has twice vacated as unconstitutional FCC regulation of the employment practices of broadcasters. In *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *reh’g denied*, 154 F.3d 487, *reh’g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) (“*Lutheran Church*”), the Court of Appeals held that the FCC’s previous EEO rule amounted to an unconstitutional race-based classification system

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<sup>5</sup> See e.g. 47 C.F.R. §17.23 (lighting and painting of antenna towers to protect aviation safety).

<sup>6</sup> See e.g. OET BULLETIN 65, *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields* (Aug. 1997).

<sup>7</sup> See e.g. *Loral Spacecom Corp.*, 13 FCC Rcd 16438 (1998).

because it exerted pressure on broadcasters to *hire* employees based on race. As a result, it did not survive strict scrutiny. In *DC/MD/DE Broadcasters v. FCC*, 236 F.3d 13, *reh 'g & reh 'g in banc denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) (“*Broadcasters*”), the court of appeals held that the FCC’s new EEO rules pressured licensees to *recruit* on the basis of race and was, therefore, also a race-based classification violating the equal protection component of the Fifth Amendment’s Due Process Clause. Any re-regulation now must, therefore, avoid pressuring licensees to make race-based employment decisions. This is especially true for licensees, such as the University, which operate under additional requirements and, as state actors, must follow Constitutional requirements limiting such race-based considerations lest they violate equal protection under the Fifth Amendment.<sup>8</sup>

The University also opposes any requirement that broadcasters track the recruitment sources that attract job applicants. The Commission asked whether it should require such tracking to ensure that stations “are in fact achieving broad outreach.” *Second NPRM* at ¶32. But true “broad outreach” is dependent only on choosing good recruitment *methods*, such as the Internet, not on any measurable results. In contrast, “tracking” looks at outcomes – and no way exists to determine if tracking works without establishing an unconstitutional system in which the Commission and employers create a diversity quotient to determine if the outcome is acceptable. Such a regulatory regime would pressure licensees to hire people because of their race, ethnicity or culture, when diversity is not optimized – lest the licensee violate Commission rules and policies. This is precisely the kind of regulatory structure that the Court of Appeals has held to be contrary to the Fifth Amendment in *Lutheran Church and Broadcasters*. As a public

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<sup>8</sup> See *Lutheran Church* 141 F.3d 344, and *Broadcasters*, 236 F.3d at 16-19.



institution that is an organ of a state government, the University should not be placed in a position in which compliance with one set of federal rules will potentially place it in jeopardy of violating constitutional rights, and vice-versa.

### CONCLUSION

For all the above reasons, the University calls on the Commission to avoid repeating the mistakes of the past and, instead, create a system of broad outreach that will withstand constitutional challenges. The imposition of unconstitutional conditions poses a special problem to organs of government, such as the University. Instead, the Commission should leverage new technologies that make broad outreach easier and more efficient than ever before in history. When combined with traditional hiring methods involving referral organizations, the Internet ensures that anyone seriously seeking broadcast employment can find the information required to pursue such a career. For all the above-stated reasons, the University respectfully requests that the University adopt the kind of EEO policies enumerated above.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

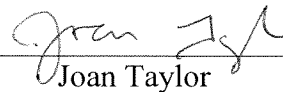
I hereby certify that on this 15th day of May 2002, a true and correct copy of the foregoing COMMENTS OF THE CURATORS OF THE UNIVERSITY OF MISSOURI was sent by postage prepaid, first-class mail, unless otherwise indicated, to the following:

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